

CITATION: *MM v SM and SD and CEO DCF, LD and AD*

PARTIES: MM Applicant  
V  
And  
SM and SD Children  
And  
Chief Executive Officer, Department of  
Children and Families  
LD  
And  
AD Respondents

TITLE OF COURT: LOCAL COURT

JURISDICTION: FAMILY MATTERS

FILE NO(s): 21330067

DELIVERED ON: 23 October 2015

DELIVERED AT: Katherine

HEARING DATE(s): 9 and 12 October 2015

JUDGMENT OF: Sue Oliver SM

**CATCHWORDS:** LOCAL COURT – FAMILY MATTERS JURISDICTION –  
STATUTORY INTERPRETATION – *Care and Protection of Children Act* –direct and  
significant interest in wellbeing of child

**REPRESENTATION:**

*Counsel:*

Applicant: Mr Fawkner  
Respondents: Ms Bell for LD and AD  
Mr O'Connor for CEO

*Solicitors:*

Applicant:

KWILS

Respondents:

NAAJA for LD and AD

SFNT for CEO

Judgment category classification:

A

Judgment ID number:

021

Number of paragraphs:

22

IN THE LOCAL COURT  
AT KATHERINE IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21330067

BETWEEN:

**MM**

Applicant

AND:

**SM and SD**

Children

And

**CEO, DEPARTMENT OF CHILDREN  
AND FAMILIES**

AND

**LD**

AND

**AD**

Respondents

REASONS FOR JUDGMENT

(Delivered 23 October 2015)

SUE OLIVER SM:

1. This is an interlocutory application by the maternal grandmother MM to be joined as a party to these proceedings. On 12 October 2015 I refused leave to join the applicant as a party to proceedings and said I would publish my reasons.
2. The grandmother's application was supported by a brief affidavit in which she states that she has only seen the children subject to this application

once and this was when she went with the now deceased mother to Darwin to visit them. Although no date is given for this visit is clear that this has been since the children have been removed from the parents because the grandmother speaks about their placement in Darwin. She says that she and the mother were of the same opinion that the current carers in Darwin were looking after the girls really well and that her wish is for the girls to remain in Darwin with their current carers. Other than that she does not express any other views or a wish to be involved in the care or development of the children or any plans or wishes for future contact with them.

3. Section 125 of the *Care and Protection of Children Act* specifies the parties to proceedings.

**Section 125 Parties to proceedings**

(1) The parents of the child are the respondents in the proceedings for the application.

(2) The other parties to the proceedings are:

(a) the child; and

(b) the CEO; and

(c) a person proposed to be given daily care and control of, or parental responsibility for, the child under the order; and

(d) any other person who:

(i) has applied to the Court to be a party to the proceedings;  
and

(ii) is considered by the Court to have a direct and significant interest in the wellbeing of the child.

4. In *SJ v CEO Department of Children and Families and GM and TCS* [2012] NTSC 71 Barr J considered the operation of this provision. His Honour said that the court had to consider as a question of fact whether an applicant had a direct and significant interest in the well-being of the child and in the event that the Court decided that issue affirmatively then the applicant was a party. His Honour said “if the court makes such an

affirmative finding, there is no discretion or residual discretion as to whether to allow the applicant to be a party.”

5. The issue then is whether the grandmother has a direct and significant interest in the wellbeing of each of the children.
6. Section 14 of the Act defines wellbeing.

“Wellbeing includes the child's physical, psychological and emotional well-being”

7. In *PR v Chief Executive Officer of the Department of Child Protection and B (a child) and LR and DB* [2008] WASC 228 Jenkins J considered the meaning of a similar provision for the joining of a party to proceedings under the equivalent Western Australian child protection legislation. Although that legislation differs in the definition of wellbeing the provision is identical as to the requirement that there be a direct and significant interest in the wellbeing of the child. His Honour considered dictionary meanings of the words direct and significant saying that direct meant straightforward or immediate or without intermediaries or without intervening agency, immediate and personal. With respect to significant, His Honour said that the word means important or notable. I would add to these definitions a further but consistent definition of the word “significant” which includes “of **considerable** amount or **effect** or importance.”<sup>1</sup> (my emphasis)
8. It was submitted that in determining whether the grandmother has a direct and significant interest I should take into account that following the death of the mother during the proceedings, the maternal side of the family would be unrepresented at the hearing of these proceedings unless the grandmother was joined as a party. To support this submission reference was made to principles of the Act primarily to section 8 as to the role of

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<sup>1</sup> Concise Oxford Dictionary, 6<sup>th</sup> Edition.

the family and to section 12 which deals specifically with aboriginal children. The underlying principles of the Act are to be applied and upheld as far as practicable when anyone is exercising a power or performing a function under the Act. The principles therefore apply to a determination of applications by the Court, including applications to join a party to proceedings.

9. Section 8 provides

(1) The family of a child has the primary responsibility for the care, upbringing and development of the child.

(2) In fulfilling that responsibility, the family should be able to bring up the child in any language or tradition and foster in the child any cultural, ethnic or religious values.

(3) A child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child.

(4) As far as practicable, and consistent with section 10, if a child is removed from the child's family:

(a) contact between the child and the family should be encouraged and supported; and

(b) the child should eventually be returned to the family.

10. While it might be said that section 8(3) in particular supports the joining of a member of the child's family in order to be heard on the issue of removal from the family, to take that view would be inconsistent with the specific criteria for the joining of a party to the proceedings as required by section 125. Given the very broad definition of "family" in section 19, in essence to accept that section 8 provides a family member with a right to be joined and heard in proceedings would allow anyone with a lineal connection or close association to a lineal member to be joined as a party to proceedings.

11. In *PR v Chief Executive Officer of the Department of Child Protection and B (a child) and LR and DB* [2008] WASC 228 at [62] Jenkins J said

"I except that the legislature intended that, in order to be a party to the proceedings, a person must be more than a relative (other than a

parent) or have more than a direct lineal relationship with the child, for the purposes of s147(e). The legislature also intended that the person's interest in the well-being of the child must be direct in the sense that they must immediately, and without any intermediary, have an interest in the care, development, health and safety of the child. Thus, it would not be sufficient for a person to be joined as a party to proceedings simply to support the interest of another person in the wellbeing of a child.”

12. I would respectfully agree. It is not, in my view, sufficient for the purposes of joining a person as a party to proceedings to rely only on the familial or lineal relationship. Section 125 requires more than that. It is a matter for determining on an individual basis, whatever may be the relationship or connection between the applicant and the child, whether the threshold of a direct and significant interest in the wellbeing of the child is met.

13. Section 12 is in these terms:

(1) Kinship groups, representative organisations and communities of Aboriginal people have a major role, through self-determination, in promoting the wellbeing of Aboriginal children.

(2) In particular, a kinship group, representative organisation or community of Aboriginal people nominated by an Aboriginal child's family should be able to participate in the making of a decision involving the child.

(3) An Aboriginal child should, as far as practicable, be placed with a person in the following order of priority:

(a) a member of the child's family;

(b) an Aboriginal person in the child's community in accordance with local community practice;

(c) any other Aboriginal person;

(d) a person who:

(i) is not an Aboriginal person; but

(ii) in the CEO's opinion, is sensitive to the child's needs and capable of promoting the child's ongoing affiliation with the culture of the child's community (and, if possible, ongoing contact with the child's family).

(4) In addition, an Aboriginal child should, as far as practicable, be placed in close proximity to the child's family and community.

14. In my view section 12 does not add anything to the determination of the issue. Section 12 acknowledges the role of kinship groups, representative organisations and communities of Aboriginal people in promoting the wellbeing of Aboriginal children and participation by those groups in making decisions about a child. It also provides for a principle in relation to placement of an Aboriginal child, giving preference to placements that involve the child's aboriginal heritage. It is not in my view a principle that has any work to do in relation to determining parties to the proceeding.
15. Moreover, the question of whether an applicant for joinder has a direct and significant interest in the child's wellbeing is a question of fact<sup>2</sup> to be determined on an individual basis and it is difficult to see how principles of general application could direct or influence the answer to that question, by introducing a factor based on aboriginal ethnicity. That would result in introducing an element to the issue not related to the actual question of whether or not the **applicant** has a direct and significant interest. In my view this cannot have been intended by the Legislature on a plain reading of the provision.
16. According to the grandmother's affidavit she has had extremely limited contact with the children. She has seen them only on one occasion and that is since they have been placed under the daily care and control of the CEO. She does not express any wish for any future involvement with the children either by way of direct care or regular contact. She simply expresses a wish that the children should stay with their current foster parents, presumably in contradiction to the order sought by the paternal grandmother who has

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<sup>2</sup> *SJ v CEO Department of Children and Families and GM and TCS* [2012] NTSC 71



been joined as a party and seeks a parental responsibility order in her favour.

17. It appears to me from MM's affidavit that her view that the children are being looked after "really well" is based on her observation of the children at a single contact visit with the mother and discussion with the mother. As she has never previously had contact with the children, it is difficult to see how a view based on a single meeting with the children is one that could influence a view as to what is in each child's physical, psychological and emotional wellbeing in the longer term.
18. It is further submitted that if the grandmother is not joined then the maternal side of the family will not have any say in the proceedings. In my view this is not the right test to apply in determining joinder of a party. A direct and significant interest in the child's wellbeing must be shown. Once satisfied of that, the person must be joined to the proceedings. The interest is an individual one not a group one. Only when joined does the party have "a say" in the proceedings as they have then the same rights and responsibilities as all other parties.
19. In my view, the use of the term "direct" in describing the requisite interest is intended to describe an interest that involves the applicant directly in some aspect of the child's life, that is, directly in the circumstances of their care or development, such that it might affect or influence their well-being. It is not just an interest in how some other party to the proceedings might address those matters.
20. The interest must also be "significant" which in my view means that it must be more than a casual or familial interest; it must be an interest that is of considerable effect or importance with respect to the child's well-being.
21. In my view, the grandmother's interest in the children based on her limited past contact and the lack of any future proposal for involvement in their

lives cannot be said to be either a direct or significant interest. It does not reveal any greater interest in their wellbeing than any other relative might hold in relation to them and their present needs. There is no proposal for direct involvement either by way of care or with respect to ongoing contact. Although the definition of wellbeing is an inclusive one, the employ in the definition of the words “psychological and emotional” in my view indicates that the interest required is a long term one centred around a child’s overall development not just their present care needs. There is no evidence that MM has a view or interest in the children other than that they remain at present with their current foster carers.

22. In those circumstances I was not satisfied that she has a direct and significant interest in the children's well-being and for that reason I refused her application to be joined as a party to the proceedings. I should add that my decision is in no way a reflection of the character or otherwise of the maternal grandmother. It is simply that on the evidence she does not possess the interest required under the Act to be joined as a party.

Dated this            day of            2015

SUE OLIVER SM